NO. 15083

IN THE

United States

Court of Appeals

FOR THE NINTH CIRCUIT

MERVIN MOUNCE,

Petitioner,

vs.

UNITED STATES OF AMERICA,

Respondent.

PETITION FOR REHEARING

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LEECRAFT PRINTING COMPANY

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TO THE HONORABLE THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT:

The petitioner herein respectfully prays for a rehearing and reversal of the decision of this Court of June 28, 1957, ----------Fed. (2d)----------, affirming a judgment of District Court of the United States for the Eastern District of Washington, Northern Division, which held certain periodicals to be obscene within the provisions of 19 USC. 1305 (a), and ordered their destruction. This petition for rehearing is based upon three substantial grounds not available to petitioner at the time of hearing, and not previously presented, and for substantial grounds presented only indirectly.

ARGUMENT

FIRST

The Roth case is distinguished on fact. It was a criminal action, in which Roth was charged with conduct "calculated" to corrupt and debauch, by appealing to the erotic interest of his customers. We have no such "calculated conduct" here, but only the importation of periodicals, clean as to word content, with pictures illustrating the text, and "calculated" to "secure new converts to the movement." (R. 21)

The Opinion of June 28, 1957, adopts the Opinion of the District Court defining obscene as something which "offends the sense of propriety, morality and decency . . . of the average, normal, reasonable and prudent person of the community in which the publication is circulated." (R. 21)

However, the Supreme Court in Roth describes obscene material as "Material which deals with sex in a manner appealing to prurient interest." (25 U.S. Law Week 4542)

Then the Court defines "prurient" as "Material having a tendency to excite lustful thoughts." (id. at 4542 n. 20)

SECOND

In the Roth case the Court was passing upon the *conduct* of a person, not upon the abstract definition of obscene. Here we have no conduct—or even periodicals—*calculated*

to do anything except secure new converts to the Nudist Movement, and Nudism is found not to be obscene.

In his concurring Opinion in Roth, Mr. Chief Justice Warren said, "It is not the book that is on trial; it is a person. The conduct of the defendant is the central issue, not the obscenity of a book or picture." (25 U.S. Law Week 4545)

Then the Chief Justice continues, "That is all that these cases present to us, and that is all that we need to decide."

Therefore, the actual holding of the Court in Roth is not authority for the determination of the instant case, upon the facts presented.

THIRD

We respectfully suggest that the decision here, while not so intended, in effect, holds that Nudism is obscene.

The uncontradicted evidence is that the pictures are used solely to illustrate nudism. This Court adopts the Opinion of the Trial Court which found "The printed context of the periodicals was clean and have no indecent, obscene or filthy language." (R. 27)

And that the books are "designed to portray nudist pictures and to secure new converts to the movement." (R. 20-21)

"Such *pictures* are obscene to the average person." (R. 28) (Italics mine).

It will be seen, therefore, that, in effect, the Trial Court found, and this Court has affirmed, that nudism is obscene, contrary to the decisions of the Courts in:

Parmalee v. U.S. 113 Fed. (2d) 72;

Summerfield v. Sunshine Book Co. 221 Fed. (2d) 42.

Roth was convicted of mailing material "calculated to corrupt and debauch the minds and morals of those to whom it was sent." When the Jury found he was so "appealing to erotic interest" he was guilty whether or not the material was obscene. If he had taken a picture from a magazine, medical book, or the Art Museum and used it "to appeal to the erotic interest," he would be guilty, even though the picture, in context, might not have been obscene. Nudity is not obscene, and pictures illustrating nudity are not obscene, when used solely for that purpose. But when used "to appeal to the erotic interest," they may become obscene. We believe Mr. Chief Justice Warren was attempting to distinguish between obscenity in the abstract, and the use of something "for obscene purposes," when he said "That is all we need to decide."

Nowhere does the Roth decision even indicate, let alone decide, that if Roth had merely been promoting a Nudist Movement, and not selling the materials, "to appeal to erotic

interest," that the conviction would have been sustained.

The evidence in the instant case is exactly the opposite from that in the Roth case. Here the Trial Court found the books were "designed to portray Nudist practices and to secure new converts," but held them to be obscene because "Nudism is in the minority."

Again the Trial Court found the printed text "uniformly unobjectionable," (R. 20-21); and then found "such pictures are obscene." (R. 28). Clearly the Trial Court was passing on the *pictures* as though not used solely for illustration, after finding they *were* used solely for illustration.

The cases unanimously hold that the "purpose" of a picture or statement makes it obscene or non-obscene; e.g.:

An *attempt to corrupt morals* of the average person;

An *attempt to arouse erotic instinct;*

An *attempt to portray filth;*

An *attempt to promote lust;*

A *purpose* to *deprave.*

Throughout all the decisions the PURPOSE, or general purport of the book, is the determinative factor. That is not the basis of Roth and Kingsley. But here the Trial

Court finds the PURPOSE is to promote Nudism, which is not obscene, and to secure converts to that group. The findings negative any ulterior or obscene purpose. It is admitted, we believe, that Nudism teaches and practices cleanliness, wholesomeness, temperance, abstinence from alcohol and tobacco, antisex and antifilth. The uncontradicted testimony herein so shows. As stated in Parmalee, "Nudity in art has long been recognized as the reverse of obscene."

FOURTH

The decision fixes no boundary line for obscenity and might make a work of art obscene, regardless of how it is used, or the purpose of the user.

The Act upon which this action is based sets no standard for defining what is obscene, and one Court may hold these books obscene and another Court may hold they are not obscene. Mr. Chief Justice Warren touched on this point in the Kingsley case when he said "There is totally lacking any standard in the statute for judging the book in context . . . It is the manner of use that should determine obscenity. It is the conduct of the individual that should be judged, not the quality of art or literature." (Kingsley Books, dba, etc., v. Brown, 107, decided June 24, 1957; 25 U.S. Law Week 4560)

FIFTH

Obscenity depends on the Opinion of the local com-

munity under the Trial Court's dceision.

The decision is based on "the judgment of the average, normal, reasonable, prudent persons of the community in which the publication is circulated," in effect, holding that anything is obscene if such local community believes it to be obscene. We immediately wonder who can be determined to be normal—who is reasonable—and who is prudent? If the people of a certain community were one hundred per cent Atheists, and honestly believed that a picture of the Christ was obscene to them, should a Court prohibit the circulation of such a picture in their community by Christians attempting to convert them?

We respectfully suggest that the effect of this decision will not only be far reaching, but will be very confusing as to standards.

SIXTH

The Opinion conflicts with Ulysses and Sunshine Book Co.

In U.S. v. Book Ulysses, 72 Fed. (2d) 705, the Court held that even obscene parts, if used solley to illustrate non-obscene treatises, do not make the book obscene. While here, the Court holds that parts which are obscene, make the periodical obscene, even though used "to secure new converts to the movement," and even though the pictures are used solely to illustrate clean printed material.

In Sunshine Book Co. v. Summerfield, 349 U.S. 921, 75 S. Ct. 661, 99 L. Ed. 1253, the Supreme Court denied Certiorari where the pictures were obscene but used only to illustrate clean printed material, almost identical with the periodicals here.

For the foregoing reasons, we respectfully urge this Honorable Court to grant a rehearing on this case in order to harmonize the decision with the decisions of the Supreme Court of the United States.

DATED this 22d of July, 1957.

Respectfully submitted,
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CERTIFICATE

I, C. C. ROWAN, Counsel of Record for petitioner herein, hereby certify that in my judgment the foregoing Petition for Rehearing is well founded and that it is not interposed for delay.

DATED July 22, 1957.

C. C. ROWAN
Attorney for Petitioner.